No. 3276

IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

## For the Ninth Circuit

*Upon Appeal from the United States District Court for the District of Idaho, Northern Division.*

ALRA G. FARRELL, SUBSTITUTED FOR BELDON M. DELANY,

*Appellant,*

*vs.*

EDWARD RUTLEDGE TIMBER COMPANY, A CORPORATION, AND NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,

*Appellees.*

OPENING BRIEF OF APPELLANT.

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# OPENING BRIEF OF APPELLANT.

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## STATEMENT.

Beldon M. Delany, as plaintiff, began this action seeking to have the defendant Edward Rutledge Timber Company declared to be a trustee for him of the legal title to a certain quarter section of land hereinafter described, of which title Delany claimed to be the equitable owner by virtue of settlement and subsequent entry and final proof made under the homestead laws of the United States.

The facts involved in the consideration of the questions raised on this appeal as shown by the pleadings, established on the trial and found by the trial court, are as follows:

Under date of July 5, 1901, the Governor of the State of Idaho applied to the Surveyor General of the State of Idaho and the Commissioner of the General Land Office, for a survey of certain townships of unsurveyed lands, including the land in question, under the act of August 18, 1894, which application was filed in the Office of the Commissioner of the General Land Office on July 15, 1901; thereafter the State complied with the requirements of this act and actually obtained title to some of the lands covered by this application, but no part of the lands involved in this action.

The defendant, Northern Pacific Railway Company, attempted to select this land under the act of March 2, 1899, and claims to have filed its lieu selection list No. 71 in the Local Land Office at Coeur d'Alene, Idaho, on July 23, 1901.

On or about May 1st, 1902, one W. B. Leach, a citizen of the United States over the age of twenty-one years and qualified to make homestead entry, having no knowledge of the application of the State or of the filing of the lieu selection list above referred to by the Northern Pacific Railway Company, settled upon a portion of the vacant unoccupied public domain of the United States, which was afterwards, by the official survey of

the United States, found to be the Northeast Quarter of Section 20, Township 43, North Range 4, E. B. M., and continuously resided and made his home thereon until June 21, 1903, when Beldon M. Delany, also a citizen of the United States, competent to acquire lands under the homestead laws, purchased the improvements of W. B. Leach and made settlement of this land, established his home thereon, with the intention of entering the same under the homestead laws of the United States when open for entry, and further improved and cultivated the land and continuously resided and made his home thereon until the time of his death, which was subsequent to the commencement of this action. This action was commenced in July, 1916.

The land was surveyed and opened to settlement on June 4, 1909. Delany made application to enter the lands under the homestead laws on June 10, 1909, and on or about November 20, 1912, offered final proof, having made his home upon said land, cultivated and improved the same for more than ten years at that time.

In fact, all went merry as a marriage bell till Delany attempted to make homestead entry, then his application to enter was rejected "for the

reason that the same is all in conflict with the selection by the State of Idaho," as stated in the notice of rejection given Delany by the Register of the Local Land Office on August 24, 1909. (See R., p. 115.)

From this decision rejecting his homestead application, Delany appealed to the Commissioner of the General Land Office and on December 16, 1909, the Commissioner of the General Land Office sustained the decision of the Local Land Office, saying in part:

> "It appears, however, that said T. 43, N. R. 4 E. with a number of others was withdrawn from settlement or other appropriation adverse to the State, under date of July 5, 1901, upon application of the Governor of Idaho, under the act of August 18, 1894 (28 Stats. 394). The language of the statute is in part as follows:
>
> 'And the lands that may be found to fall in the limits of such townships, as ascertained by the survey shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office.'
>
> Unless therefore, it could be shown that you

were a settler on said N.E.¼ of Sec. 20, prior to the date of the application for the withdrawal by the Governor, the State's right to said tract, under its indemnity selection, is superior to yours, and since it appears that at the date of your application, said tract was covered by the State's list, your application was properly rejected by the local officers.

Very respectfully,

Fred Dennett, Commissioner."

This matter was thereafter re-opened and such proceedings had, that on June 28th, 1915, the claims of the State of Idaho were cancelled and rejected, and thereafter and on July 9, 1915, the homestead application of Delany was held for rejection on the ground that it was in conflict with the selections of the Northern Pacific Railway Company. (See R., p. 118.) From this decision of the Commissioner of the General Land Office, Delany appealed to the Secretary of the Interior, and on November 18, 1915, the Secretary affirmed the decision of the General Land Office upon the ground that the Northern Pacific Railway Company had the right to make a valid application for these lands, notwithstanding the claim of the State of Idaho, and that the claim of the Railway Company might be made subject to the preferred right of appropriation in the State. (See R., p. 119.)

Patent was issued to the Northern Pacific Railway Company, and the Railway Company thereafter conveyed to the defendant Edward Rutledge Timber Company, who now holds the legal title.

Subsequent to the commencement of this action Beldon M. Delany, the original plaintiff, died, and Alra G. Farrell, his sister, was substituted as plaintiff, Alra G. Farrell having succeeded to all of the rights of the said Beldon M. Delany in the lands in controversy.

It further appeared on the trial of the cause, that in July, 1901, the time when the Northern Pacific Railway Company attempted to select this land under the act of March 2, 1899, by filing its lieu selection list No. 71 in the Local Land Office at Coeur d'Alene City, Idaho, that these lands were vacant, unappropriated, unoccupied and unsurveyed public lands of the United States.

That on May 1st, 1902, when W. B. Leach made his first settlement upon these lands, the lands were then a portion of the vacant, unoccupied and unsurveyed public domain of the United States. That when Leach made settlement he immediately built a cabin and took possession of the land, blazed a line around his claim to locate his boundaries and posted notices on each corner; that when

Beldon M. Delany bought out Leach in June, 1903, he took down Leach's notices and posted notices of his own, and that at that time there was no evidence upon the ground that any other person or corporation whomsoever was making any claim to the said land or any part thereof, and the said Delany did not know that any attempt had been made to appropriate the land either on the part of the State of Idaho or the Northern Pacific Railway Company, nor was there anything upon the said land or in the Land Office at Coeur d'Alene, Idaho, to indicate that any such claim was made, save and except that the lieu selection list of the Northern Pacific Railway Company, above referred to, was on file, and the application of the State of Idaho was likewise a matter of record in said General Land Office, but, there was no record, tract book or index by which this fact could be ascertained by the inquiring public, or by the said W. B. Leach, Beldon M. Delany or either of them, because of the fact that no survey of the said land had theretofore been made.

That on said 21st day of June, 1903, the date when the said Beldon M. Delany first purchased the rights of the said W. B. Leach and made settlement upon the land, the nearest surveyed line to

the said lands was the East line of Township 43, Range 2, E. B. M., being 7½ miles distant from the nearest part of the said Northeast Quarter of Section 20, T. 43, N. R. 4, E. B. M., and the land and country between these two lines was very rough and mountainous, and most of it covered with heavy timber.

It will be necessary to quote more fully and in detail from the evidence in connection with the argument, but this brief outline we believe will be sufficient for present purposes.

## ARGUMENT.

### I.

The attempts on the part of the Northern Pacific Railway Company to select this land under the Act of March 2, 1899, by filing its lieu selection list No. 71 in the United States Land Office at Coeur d'Alene, Idaho, in which it merely described the land as, "*The following tract which when surveyed will be described as follows:* All of 20,-43-4, containing 640 acres," was not a compliance with the requirements of the Act of March 2, 1899, and conferred no right upon the Railway Company as against either the State of Idaho or the plaintiff in this cause.

This being a grant by the Government to a private corporation of certain rights upon the public domain of the United States, it follows that the terms must be strictly construed with before any rights will be acquired by the grantee. This rule is too familiar to require citation of authority.

Sections 3 and 4 of the Act of March 2, 1899, are as follows:

> "Sec. 3. That upon execution and filing with the Secretary of the Interior, by the Northern Pacific Railroad Company, of proper deed releasing and conveying to the United States the lands in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said Company, whether surveyed or unsurveyed, which lie opposite said company's constructed road, said company is hereby authorized to select an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual Government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States; Provided, that any settlers on lands in said national park may relinquish their rights thereto and take other public lands in lieu thereof, to the same extent and under the same limitations and

conditions as are provided by law for forest reserves and national parks.

Sec. 4. That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed in due form of law, and deliver to said company, a patent of the United States conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the Company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity."

By Section 4 it is seen that, "In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the Company at the local land office shall describe such tract *in such manner as to designate the same with a reasonable degree of certainty.*"

The object and purpose evidently of the act is to require the Company, in any attempt to select unsurveyed lands, to give notice of its selection to the public, bearing in mind that settlers had a right to go upon the unsurveyed public domain and acquire a priority of right of entry by such settlement, and that the law in force at the time of the passage of the Act of March 2, 1899, required these settlers to mark any lands so selected by them plainly upon the ground so as to give physical notice of their claim.

What, then, is a "reasonable degree of certainty" within the meaning of the act in question, must be determined by a proper consideration of the facts above stated. The rights of the settler to go upon the land and make settlement should be borne in mind and the notice required should be such as to protect him to a "reasonable degree of certainty." In this connection the Court will take judicial notice of the fact that prior to the official survey by the United States of its public domain, there is no place in any Land Office for the making of any record concerning "land which when surveyed will be Section 20," etc. We mean by that, that there is not even a book in the office in which such a record could be entered so that it would

be indexed and available as information to the inquiring public. Everybody knew that the lands in controversy were located near Marble Creek, and upon a certain branch of, or at a certain point upon the creek, but no one knew, or could they have ascertained by any reasonable means, that the lands in controversy were at the time of the settlement of Delany and at the time of the filing of lieu selection list No. 71 by the Northern Pacific Railway Company, "lands which when surveyed will be Section 20," etc.

These questions were presented to this Court in case of Andrew West vs. Edward Rutledge Timber Company, reported in 221 Federal, page 30. In the West case the land in controversy was situated three and one-half miles from the nearest surveyed line. In the decision in the West case this Court said:

> "Now, if we move away a step farther from the established survey, and describe the tract to be selected as Section 12, Township 1 North, it would not be a difficult task to set foot on the land and determine accurately its limitations. There would still be a reference back, or a tying back, to Section 36, Township 1 North. But the farther the removal from an established survey, it stands to reason, the greater will be the difficulty of setting foot on the identical tract, *until eventually no reasonable being could*

*expect another to tie back to a known survey for the purpose of identification.''*

In the case at bar the removal from an "established survey" is 7½ miles over a rough, mountainous country covered by timber, and we submit that in this instance "no reasonable being could expect another (Delany) to tie back to a known survey for the purpose of identification." Under the circumstances, if Delany had employed an experienced and skilled surveyor to survey these lines, he would have had no assurance that he was located upon what might later be established by the official Government survey as the N.E.¼ of Section 20; for under the existing conditions, it is highly improbable that any two surveys would have established common lines, and what lands would have been designated as the N.E.¼ of Section 20 by the Government survey could not by that means have been determined because the Government survey might have located the Northeast Quarter of Section 20, eight miles east of the then established line instead of 7½ miles.

In the phrase, "with a reasonable degree of certainty," "certainty" means "free from doubt." In view of the fact that Government surveys are in fact in a large percentage of cases found to be

very inaccurate, there must be great doubt and uncertainty in any attempt to anticipate the lines of the official survey.

Again the description and notice was not to be given to an expert surveyor but to the prospective settler—seldom skilled in this line and often with no knowledge of the profession.

For these and other reasons which are quite apparent, we submit that the description used was unreasonable under the circumstances and amounted to no description.

What is reasonable, the facts being admitted, in a question of law, hence the Land Department has, by an error of law, awarded the lands in suit to the defendant when Delany was clearly entitled to them.

To the point that this is purely a question of law, we cite the following analagous decisions:

> "Whether the regulation of a Railroad Company, separating white and colored people and providing separate cars for each race was a reasonable one or not the facts being admitted, is a question of law for the Court."
>
> *Chilton vs. St. L. & Iron Mt. R. Co.*, 19 L. R. A., 269.

"A police regulation must not extend beyond

that reasonable interference which tends to preserve and promote enjoyment generally of those inalienable rights with which all men are endowed, etc.," * * * "and that whether an act purporting to be within the field of the police power is reasonable or not, in the ultimate, is a judicial question."

*Bonnett vs. Vallier,* 116 N. W. 885, 17 L. R. A. (N. S.) 486-491;

*State vs. Redmon,* 114 N. W. 137, 14 L. R. A. (N. S.) 229.

"What is a reasonable time to object to items of an account rendered, the dates being clear, is a question of law."

*Fleischner vs. Kubli,* 25 Pac. 1089;

*Standard Oil Co. vs. Van Etten,* 107 U. S. 333-334, 27 Law Ed. 322.

"The construction of a written contract where no extrinsic evidence is necessary to explain its terms and also of an oral contract where its terms are admitted is a question of law for the Court."

9 *Cyc.* 591;

38 Wash. 439.

## II.

## THE DEFENDANT RAILWAY COMPANY COULD ACQUIRE NO VALID RIGHT TO THE LAND BY REASON OF ITS ATTEMPTED LIEU SELECTION, BECAUSE OF THE FACT THAT PRIOR TO THE TIME OF SUCH ATTEMPTED SELECTION, THE STATE OF IDAHO HAD MADE ITS APPLICATION TO SELECT THIS LAND UNDER THE ACT OF AUGUST 18, 1894.

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On July 15, 1901, the Governor of the State of Idaho made application for survey under the Act of August 18, 1894.

On July 23, 1901, the Northern Pacific Railway Company filed lieu selection list No. 71 under the Act of March 2, 1899.

On or about May 1st, 1902, W. B. Leach settled on this land.

On June 21, 1903, Delany settled on this land in suit.

On June 4, 1909, official survey was made and filed in the Local Land Office.

On June 10, 1909, Delany made homestead entry.

The record in this case shows that Delany's homestead application was rejected by the Local Land Office on August 31, 1909, for the reason, "that the same is all in conflict with the selection by the State of Idaho." (Record, p. 115.) Delany appealed from the decision of the Local Land Office, and on December 16, 1909, the Commissioner of the General Land Office affirmed the decision of the Local Land Office, saying in part:

> "It appears, however, that said T. 43, N. R. 4, E., with a number of others was withdrawn from settlement or other appropriation adverse to the State, under date of July 5, 1901, upon application of the Governor of Idaho, under the act of August 18, 1894 (28 Stats. 394). The language of the statute is in part as follows:
>
> 'And the lands that may be found to fall in the limits of such townships, as ascertained by the survey shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise, except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office.'
>
> Unless, therefore, it could be shown that you were a settler on said N.E.¼ of Sec. 20, prior to the date of the application for the withdrawal by the Governor, the State's right

to said tract, under its indemnity selection, is superior to yours, and since it appears that at the date of your application, said tract was covered by the State's list, your application was properly rejected by the local officers.

Very respectfully,

Fred Dennett, Commissioner."

*On March 20, 1911,* First Assistant Secretary of the Interior in reviewing the law of this case, and having under consideration the identical question above referred to, said:

"'A sufficient answer to this contention is that for the purposes of this case it is immaterial that the Commissioner of the General Land Office refused to "withdraw" these lands. By the terms of the act of August 18, 1894, *supra,* under which the application for survey was made, the withdrawal became effective and was an accomplished fact upon the perfection of the application and while it remained for the Commissioner of the General Land Office to give notice of the withdrawal, the failure of that officer to do so did not defeat it. The withdrawal was statutory and in nowise depended on the discretion of the Commissioner of the General Land Office (Thorpe *et al.* v. State of Idaho, 35 L. D. 640). This being true, and *the lands being withdrawn for a special purpose, they were not subject to selection by the railway company,* and this is true without regard to the question whether the State had previously apparently selected an excess of land to satisfy its grants.'

* * * * * *

*This office considered the company's selections as invalid when made because the lands applied for were withdrawn for the State under the act of August 18, 1894, supra,* that the departmental decision on review was determinative of the company's claim to the lands in question and that the fact of the applications to select presented by the State being in excess of the area required to satisfy its grants in no manner cured the invalidity of such selections.

Under this view of the matter, I am of the opinion the order of suspension of November 20, 1908, should be revoked, the company's selections canceled, and the case closed as to the company.

* * * * * *

It is urged on behalf of the company, in substance: * * * * (2) That, admitting for the sake of the argument, though not conceding, that the State by its application for survey secured a preference right to select said lands in accordance with the provisions of the act of 1894, yet, if the State's selections failed for any cause other than defective application for survey, under well settled rulings, of the land department, the company's right would attach as of the date of its selections, and that it would be entitled to priority over claims of any character subsequently initiated.

The prior adjudications in this case have proceeded upon the assumption that the State's application for survey of these townships was regularly filed, and that there was due compliance on its part with every essential requirement of law, the questions heretofore raised going to alleged failure of the commissioner of the General Land Office to 'with-

draw' the land upon such sufficient application and the question of legality of a withdrawal of lands admittedly largely in excess of the State's grant for all purposes. The questions so considered were decided in favor of the State and those questions will not be reopened.

The law necessarily contemplated a withdrawal or reservation of more lands than were necessary to satisfy the State's grants, and the failure of the Commissioner of the General Land Office to issue an order of withdrawal in further assurance of the legislative intention, could not jeopardize such right as was accorded the State by said act. * * * *

There thus remains only the further contention that when the State's selections failed the rights of the company attached as of the date of presentation of its lists. There is something in this argument but not so much as is claimed for it. It has never been held by this Department in a case where the State made its selections under the act of 1894 and in attempted exercise of its preference right, that upon the rejection of such selections intervening adverse claims for the same lands would be recognized as of the date proffered. *Specifically, it has surely never been held that proffered selections by a railway company, under any law, for lands covered by a valid application for survey under the act of 1894, secured any legal rights whatever.* This act provides that such lands shall be 'reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the

date of the filing of the township plat of survey in the proper district land office.'

Now, at the date these railway lists were filed these lands *were reserved from appropriation adverse to the State.* No legal rights could, therefore, have attached under such filing. The State afterwards selected the land and thereafter the question of its right thereto was one between it and the government, and that question was not complicated by the filing of intervening adverse claims, even though same were filed pursuant to and received in accordance with subsisting administrative policy. The contention made involves the consequence that in instances where, after the State's application for the survey of the township under the act of 1894, shall have been defeated by placing the lands in a national forest, still the railway claim would not be defeated by the creation of such national forest, and, therefore, by indirection, the superior claim of the State would be defeated by the inferior one of the company. Such a consequence would be wholly unfair, was not contemplated, and can not be tolerated.

If, as matter of administration, and for the preservation of equities, the land department should determine to recognize priority in the initiation of these claims, inasmuch, as it has permitted the filing thereof while the lands were so reserved for a special purpose, upon the failure of such purpose it is believed this could legally be done, but while not fully advised of the situation with such minuteness as is desirable, enough of it is known to justify the conclusion that some of this land is covered by the claims of settlers and such claims, in-

itiated as they probably were, in the belief that the State's preference right might not be asserted or might for other reason fail as to the lands settled upon, are, under uniform rulings of the land department and the courts, entitled to the first consideration.

In the adjustment of the equities of settler-claimants, the question of good faith in the initiation and maintenance of such claims is of primary importance. The company's said lists Nos. 133 and 135, embrace selections of unsurveyed lands, and it having been determined under the circumstances of this case that such selections initiated no legal right, it follows that the filing thereof was not the assertion of such claim as would prevent a settler from acquiring equities which it is the purpose of this adjustment to protect. But after the filing of the townships plats of surveys and on *July 31, 1905,* which was within the time allowed by law, the company filed its additional list adjusting these selections to the lines of the public surveys. *These additional filings gave precision to the company's claim and such notice thereof to the public as would prevent the initiation of rights by settlement thereafter upon the lands so selected. This being true, in the consideration of settlement claims your office will reject such as are based upon settlement made subsequently to July 31, 1905. As to such settlement as may have been begun prior to that date, if made in good faith by a qualified homesteader, and since maintained in accordance with law, priority will be accorded, and upon the allowance of entry for the lands so settled upon the company's selection will to that extent stand rejected.*

> If entries of any sort have been inadvertently or mistakenly allowed for any of these lands, they will rest on the same basis as settlement claims, and if they do not fall within the rule above laid down for the adjustment of such claims, they will be canceled. After the adjustment of these claims clear lists of the company's said selections will be forwarded for the approval of the Secretary of the Interior unless objection arises not herein considered." (The italics are ours.)
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> *N. P. Ry. Company vs. State of Idaho, et al.*, 39 L. D. 583.

Thus we see that from June, 1903, to March, 1911, or during the first eight years of Delany's settlement and homestead entry, his contest was with the State of Idaho, with the State winning at every turn. That is, during this period the claim of the State was upheld by the Land Department as superior to that of the settler. The claim of the Railway Company received little attention, and we see that whenever the Land Department considered the claim of the Railway Company it was flatly rejected, apparently being considered worthy of but little attention.

But later on and on June 28, 1915, the State of Idaho having satisfied its entire grant, its application of July 5, 1901, was rejected and dismissed, and the contest then became one between Delany

and the Railway Company, and on July 9, 1915, Delany's homestead application was held for rejection on the ground that it conflicted with the selection of the Northern Pacific Railway Company.

It is very interesting to note that this decision of July 9, 1915, by the Assistant Commissioner of the General Land Office rejecting Delany's homestead entry and sustaining the selection of the Northern Pacific Railway Company is based upon Delany's letter of appeal dated November 15, 1909, which appeal was decided by the Commissioner of the General Land Office on this same letter of appeal, on December 16, 1909.

On December 16, 1909, the Commissioner of the General Land Office in disposing of Delany's letter of appeal, held that the appeal should be dismissed, because the State's right to the tract was superior to that of Delany's. (See Record, p. 115.)

On July 9, 1915, the Assistant Commissioner of the General Land Office again deciding Delany's appeal based on his letter of appeal dated November 15, 1909, without any motion for re-hearing made on the part of Delany, and without any notice to Delany of such action, and in total disregard of the former decision on this appeal, dismissed his application upon the ground that it was in con-

flict with the selection of the Northern Pacific Railway Company.

Under the decisions of the Land Department effecting the land involved in this controversy from a time prior to the time the Northern Pacific Railway Company attempted to initiate any claim to these lands, to July 9, 1915, these lands were *"Reserved from any adverse appropriation by settlement or otherwise,"* in accordance with the exact language of the Act of August 18, 1894, Section 1 of which said Act being as follows:

> "That it shall be lawful for the Governors of the states of Washington, Idaho, Montana, North Dakota, South Dakota and Wyoming to apply to the Commissioner of the General Land Office for the survey of any township or townships of public lands then remaining unsurveyed in any of the several surveying districts, with a view to satisfying the public land grants made by the several Acts admitting the said states into the Union, to the extent of the full quantity of land called for thereby; and upon the application of said governors, the Commissioner of the General Land Office shall proceed to immediately notify the Surveyor General of the application made by the Governor of any of said states for the withdrawal of said land, and the Surveyor General shall proceed to have the survey or surveys so applied for made, as in the case of survey of public lands; and the lands that may be found to fall within the limits of such township or townships as ascer-

tained by the survey, shall be *reserved upon the filing of application for survey from any adverse appropriation by settlement or otherwise,* excepting as to those rights that may be found to exist of prior inception for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of township plat of survey," etc.

*Act of August 18, 1894, Federal Statutes Annotated,* Vol. 6, page 374.

Hence the Railway Company could acquire no rights by the filing of its lieu selection list on July 21, 1901.

But in addition to the provisions of the Act of August 18, 1894, the Act of March 2, 1899, under which the Railway Company makes its claim, provides that the Company may select only *"Public lands * * * * not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of making such selection."* Act of March 2, 1899, Sec. 3.

This language has been construed many times by the courts and at the time of the settlement of Delany, at the time of the filing of lieu selection list No. 71 by the Northern Pacific Railway Company, and at the time of filing its application by the State of Idaho under the Act of August 18,

1894, the rule of decision in all of the Federal Courts applicable to the case at bar, was that the Northern Pacific Railway Company by its attempted selection acquired no right whatever, and that the prior and superior right to the land under the facts shown, was in Beldon M. Delany.

We ask the Court to consider only a few of them.

The Company was authorized to select only *"Public Land."*

> "By public land is meant such land as is open to sale or other disposition under general laws: land to which any claims or rights of others have attached does not fall within the designation of public land."
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> *Barden v. Northern Pacific R. Co.*, 145 U. S. 538, 36 L. Ed. 806;
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> *Northern Pac. R. Co. v. Hinchman*, 53 Fed. 526;
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> *Northern Pac. R. Co. v. Musser Sauntry Land etc. Co.*, 68 Fed. 1000;
>
> *U. S. v. Oregon, etc. R. R. Co.*, 69 Fed. 901;
>
> *Southern Pacific Ry. Co. v. Brown*, 75 Fed. 90.

*Again*, the Act of March 2nd, 1899, provides that the Railway Company may select only lands which

are *"Not Reserved."* These lands were reserved according to the decisions of the Land Department, and also by the express provisions of the Act of August 18, 1894, as we have already seen.

*Again*—The Railway Company could only select lands *"To which no adverse right or claim shall have attached or have been initiated at the time of making such selection."*

> "It is not the *validity of any claim, but the fact that such claim was made,* that excludes the land from the category of public lands within the meaning of the act in suit granting the right to select public lands."
>
> *S. P. Ry. Co. v. Brown,* 75 Fed. 90;
>
> *McIntyre v. Roeschlaub,* 37 Fed. Rep. 556.

If the lands were excepted from the lands which the Company were authorized to select as lieu lands *at the time of the attempted selection,* subsequent abandonment by the State restored the lands to the public domain, but no rights passed to the Railroad Company.

> *Kansas Pac. Ry. Co. v. Dummeyer,* 113 U. S. 629, 28 L. Ed. 1125;
>
> *Hastings and Dakota R. Co. vs. Whitney,* 132 U. S. 357, 33 L. Ed. 363.

The foregoing authorities hold in principle, that

the application of the State of Idaho, reserved the land. That this application of the State was the initiation of a claim within the meaning of the Act of March 2, 1899, and for that reason the land was not open to selection by the Railway Company. Hence it must appear that the Land Department in deciding in favor of the defendant Railway Company, erred as a matter of law. But if there could be any doubt about the matter it has been settled by the Supreme Court of the United States in St. Paul, M. & M. Ry. Company vs. Donahue, 210 U. S. 35, 52 L. Ed. 948-9, wherein the Court construes language identical with that of the Act of March 2, 1899.

In the Donohue case the Court said:

> "But the assumptions upon which these conclusions were based clearly disregarded the fact of the long possession by Hickey and his heir of the land during the pendency of the contest, and disregarded the previous and final ruling of the Secretary, made in February, 1903, which maintained the validity of the settlement of Hickey, and decided that, by such settlement, he had validly initiated a claim to the land. When this is borne in mind it is clear that the ruling rejecting the Donohue claim and maintaining the selection of the railway company was erroneous as a matter of law, since, by the terms of the Act of August 5, 1892 (27 Stat. at L. 390, chap. 382), the

railway company was confined in its selection of indemnity lands to land nonmineral, and not reserved, 'and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection.—' When the selection and supplementary selection of the railway company was made, the land was segregated from the public domain, and was not subject to entry by the railroad company. Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 33 L. Ed. 363, 10 Sup. Ct. Rep. 112; Whitney v. Taylor, 158 U. S. 85, 39 L. Ed. 906, 15 Sup. Ct. Rep. 796; Oregon & C. R. Co. v. United States, 190 U. S. 186, 47 L. Ed. 1012, 23 Sup. Ct. Rep. 673."

*St. Paul, M. & M. R. Co. v. Donohue,* 210 U. S. 35; 52 L. Ed. 949.

But there is another theory under which the plaintiff is entitled to recover in this case. It has been repeatedly decided by the Federal Courts, including the United States Supreme Court, that patents issued by the Land Department for lands which have been previously, granted, reserved from sale, or otherwise appropriated, are void. The reason being that the executive officers of the Land Department are without authority to act in the matter under the law invoked by the party seeking the patent in such case. Unless the lands for which patent is asked are within the class designated in the statute invoked as authority for the issuance of the patent the Land Department

is without jurisdiction to act in the matter. For this reason it may even be shown in an action at law that the patent is void.

*Morton vs. Nebraska,* 88 U. S. 660, 22 L. Ed. 639;

*Hannibal & St. Joe Ry. Co. vs. Smith,* 76 U. S. 83, 19 L. Ed. 599;

*Burlington & Missouri River Ry. vs. Freemont County, Iowa,* 70 U. S. 567, 19 L. Ed. 563;

*Lake Superior Ship Canal R. & I. Co. vs. Cunningham,* 155 U. S. 354, 39 L. Ed. 183;

Wright v. Roseberry,121 U.S.520-521 B 30 Law.Ed.1048.
Smelting Co.v.Kemp,104 U.S.641 B 26 Law.Ed.876.

*M. & O.* d. 175;

. 88; 15

16 L. Ed.

If the patent to the lands in suit is void for want of jurisdiction on the part of the Land Department as held by the foregoing authorities, then the plaintiff is entitled to the relief prayed for. In any event the plaintiff has shown that the Land Department committed an error of law upon the state of facts shown in the record here. In order that the lieu selection of the defendant

Northern Pacific Railway Company could attach to these lands upon the cancellation of the claim of the State of Idaho, and become a prior and superior claim to the claim of Beldon M. Delany, who was then a settler upon the lands, or in other words, that the lieu selection of the defendant Railway Company might take effect as of the date of the cancellation of the claim of the State of Idaho, all of the conditions must have then existed which were necessary to enable it to make an original valid lieu selection as of that date, and this the Company could not do for the reason that the record shows that Beldon M. Delany was then a settler upon the land.

In other words, when the claim of the State of Idaho was cancelled on June 28, 1915, Delany was then in possession of the land, residing thereon and had duly made his application to enter the same under the homestead laws of the United States, and the lands were not "vacant and unoccupied," and "lands to which no adverse right or claim had attached or been initiated," at the time of the cancellation of the State's right, and hence were not subject to selection by the Railway Company.

Thus we see that for over twelve years Delany maintained his actual settlement upon the land and his right to the land, under and pursuant to the then current decisions of the Land Office. That is, if the law had continued to be construed and interpreted the same as it was construed and interpreted by the Land Department during the twelve years of Delany's settlement, then the lands in suit would have been awarded to Delany, and yet the respondents now ask the Court to say that the claim of the State of Idaho, which was maintained for a period of over fourteen years, during which time it was sustained by the decisions of the Land Department, and under which the State of Idaho was actually awarded lands in settlement of its claim, was not in fact the initiation of any claim at all, not even an invalid claim.

The trial Court evades a decision of the question of whether or not under the language of the Act of August 18, 1894, these lands were, upon the filing of the application of the State reserved from any adverse appropriation by settlement or otherwise by stating:

> "As already stated, the application was for the survey of eighteen townships, or approximately 403,000 acres, and other applications of a similar character were pending. Taking

cognizance of the vast area thus applied for, and of the limited right of selection remaining in the State, the Commissioner, on July 19, 1901, considered the application in question to be excessive, and declined to recognize it. No appeal having been taken by the State from his ruling, the same became final and binding, provided, of course, that the Commissioner was acting within his jurisdiction. The application having been declined, no notice of its filing was given to the district Land Office, and no notation was ever made upon the township plats in that office or upon any of its records, of the reservation or withdrawal of the land." * * * *

"Upon the question of the power of the Commissioner to reject an application for survey, the act of 1894 is equivocal, and the rulings of the Land Department have not been entirely uniform, the later decisions, however, being in support of such jurisdiction. N. P. R. R. Co. v. Idaho, 39 L. D. 583. Thorpe v. Idaho, 43 L. D. 168. State v. Robertson, 44 L. D. 448. (Also the decision herein involved.)

The language of the act, it is thought, is more readily susceptible to the construction adopted in the first decision, but in practical administration such a meaning gives rise to the most serious difficulties. In that view, a state with an unsatisfied grant of a thousand acres could, by the very simple and inexpensive process of filing an application in the General Land Office and publishing a notice for thirty days, withdraw from entry the entire area of public land, however great, within the State. Is it possible that Congress contemplated or intended such a result? By the

terms of the act, the application for survey must be made only 'with a view to satisfying the public land grants * * * * to the extent of the full quantity of land called for' by the granting acts. Is not the right, therefore, to be regarded as commensurate with the needs of the state? I am not suggesting that the amount applied for cannot in any case properly exceed the unsatisfied grant. The application must be for an entire township, whereas a smaller amount might be sufficient to satisfy the grant. But giving consideration to the extent of the grant and the character of the lands, and the interest of the Government in having its public lands disposed of and not needlessly withdrawn from entry, it is thought that the area to be surveyed must bear some reasonable relation to the area the state has the right to select. Such being the extent of the right or privilege conferred upon the state, it follows that an application for an excessive survey, being unauthorized, is ineffective, and it is for the officers of the Land Department, charged, as they are, with the sale and disposition of public lands, to determine whether in any given case the application is within the law. In any other view I am unable to see how the interest of the Government can be protected. If therefore in fact the application under consideration was found to be excessive, the Commissioner of the General Land Office did not exceed his jurisdiction in declining to recognize it, and in refusing to take any steps to carry it into effect," etc.

Here the trial court is seeking to evade the plain language of the Act, which said:

> "And the lands which may be found to fall within the limits of such township, as ascertained by the survey, *shall be reserved upon the filing of application, for survey from any adverse appropriation by settlement or otherwise,* excepting those rights which may be found to exist of prior inception, for a period to extend from such application for survey to and until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office."

Under the terms of this Act, it is not the Commissioner who reserves the land, but the law makes the reservation, and it becomes effective upon the filing of the application by the Governor, and no notice of any withdrawal is necessary to thus effect the withdrawal of the lands from appropriation or entry.

The Court makes a very adroit argument to the point,

> "that a state with an unsatisfied grant of one thousand acres could, by the very simple and inexpensive process of filing an application * * * * withdraw from entry the entire area of public land, however great, within the state. Is it possible that Congress contemplated or intended such a result?"

> "It is thought that the area to be surveyed must bear some reasonable relation to the area the state has the right to select."

Here the Court has very adroitly substituted the

judgment of the Commissioner of the General Land Office for the judgment of the Governor of the State of Idaho, in whom Congress has reposed the power and authority to determine how many townships shall be reserved for a period of *sixty days* until the State can perfect its selections. We cannot see why the trial Court should find that the vesting of this power in the Governor of the State was such a calamity and was in derogation of the common rights of the public to acquire the public lands of the United States, or wherein greater safety would lie in placing this power in the hands of the Commissioner of the General Land Office. It seems very clear and plain that the Act in question vests this function in the Governors of the several States, who are just as much the representatives of the people and intending settlers as is the Commissioner of the General Land Office, and if their respective merits are to be judged from their acts and the results of their labors, we conclude that Congress used good judgment in selecting the Governors.

The trial Court also eliminates the words "reserved" and "withdrawn" from the Act of March 2, 1899, by following the same route taken by the

Land Department, and in his decision on page 144 of the record says:

> "If, however, we assume that the application was valid, and that the Commissioner was without power to reject it, it must be borne in mind that it constituted no offer to enter the land, but amounted only to a request to have it surveyed. The land was not entered or selected; the State made no specific claim, and it might ultimately decide not to select a single subdivision. True, the terms "reserved" and "withdrawn" are used in the act, but when we consider its intent and purpose, clearly the only effect contemplated was to confer upon the State a preference right to select at its option. By the filing of the application the State initiated no claim or right to any portion of the land. As has been very properly held by the Land Department, I think the position of the State is closely analogous to that of a successful contestant after the cancellation of record of the contested entry. The land embraced in such entry is, as a result of the cancellation, fully restored to the public domain, and is no longer segregated or reserved, but the contestant possesses the preference right of entry. Accordingly, following the practice in relation to such contested entries, the Department holds that the pendency of such preference right does not operate to prevent the filing of other applications, subject to such preference right. Stewart v. Peterson, 28 L. D. 515. Cronan v. West, 34 L. D. 301. State v. N. P. R. R. Co., 37 L. D. 70. Swanson v. N. P. R. R. Co., 37 L. D. 74. Delaney v. N. P. R. R. Co., (unreported, decision Nov. 18, 1915). No good rea-

son is apparent for holding such a practice illegal."

Not one of the decisions of the Land Department cited by the trial Court will be found to be authority for this broad statement if carefully analyzed.

The first case cited is Stewart v. Peterson, 28 L. D. 515. The Land Department in the Stewart case was considering a case in which two private individuals had contested the right to enter a certain tract of land. On the closing of the contest a preference right of entry was accorded the successful contestant for a period of thirty days, and in that case the Department established the rule:

> "That no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been cancelled upon the records of the local office therefor and until the period accorded the successful contestant has expired, or he has waived his preference right. Applications may be thereafter entered and held subject to the rights of the contestant, the same to be disposed of in the order of filing upon the expiration of the period accorded the successful contestant, or upon the filing of his waiver of his preference right."

But we fail to see how this rule has any application to the case at bar, because it is a rule established under the law governing the rights of

individuals to enter lands, and hence could have no application to an attempted entry under a statute like the Act of March 2, 1899, which specifically prohibits an entry by the Railway Company under such circumstances, or, in other words, provides that in such cases the Railway Company has no right of entry.

It does not, however, prevent an individual, such as Delany, from acquiring settlement rights upon the land subject to the preference right of the successful contestant to enter within the thirty-day period. But the Stewart case goes farther and cites another rule as follows:

> "1. That no application to make entry will be received by the local officers during the time allowed for appeal from a judgment of cancellation of an entry; but in all such cases the land involved will not be subject to entry or application to enter until the rights of the entryman have been finally determined, until which time no other rights, inchoate or otherwise, can attach."

Under this rule, the application of the Railway Company having been made before the State's application was cancelled by judgment of the Land Department, the Railway Company acquired no rights inchoate or otherwise, but this rule would

not prevent Delany from acquiring settlement right under the Squatters Act.

The same is true of the case of Cronan v. West, 34 L. D. 301, cited by the trial Court. This is a case between individuals.

In the case of State vs. Northern Pacific Railway Co., 27 L. D., page 70, the Land Department says:

> "The objection that the lands were not subject to selection by the company because embraced in the State's application for survey, even if well taken, could not be interposed as to the tracts applied for by Hooper, as the company's selection was made June 21, 1901, and the State's application was not presented until July 8, following. As to Perkins, the objection, if valid, would only be material in so far as it relieved him from the necessity of proving his prior settlement. The application of the State for survey did not, however, operate as an absolute withdrawal of the land described therein, but only subjected such lands to the preferred right of the State to select them within sixty days from the time of the filing of the approved plats of survey."

Thus we see that this statement of the Commissioner is mere *obiter dictum*. There is no discussion of the rule, and a discussion of it in that case was useless because it was wholly immaterial to the case.

The case of Swanson vs. Northern Pacific Railway Company, 37 L. D. 74, decided immediately following the State v. Northern Pacific Railway Company, above cited, is based entirely upon the decision in the case of State vs. Northern Pacific Railway Co., *supra,* and the question here involved was not raised or discussed.

The Court further cites the decision of the Land Department in the case at bar. An examination of this case will show that of all the cases there cited in support of the action of the Department, not one will be found wherein the Land Department has fairly considered the question here under discussion.

Thus the trial Court falls into the error of adopting the rule of decision of the Land Department when that rule of decision is not based upon any ruling made in any cause where the present question was raised, or was necessarily involved. In other words, the rule was made in a cause wherein the question was wholly immaterial.

Thus we believe that we have shown that the Land Department, by an error of law, has taken from the plaintiff's predecessor in interest, Delany, the lands to which he was entitled, and have awarded them to the defendant Railway Company,

which Company subsequently conveyed to the Edward Rutledge Timber Company, and for the reasons here shown the decree of the trial Court should be reversed, and a decree awarded plaintiff as prayed for in her complaint.

Respectfully submitted,

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